

August 31, 2005



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in MM Docket No. 99-325

Dear Ms. Dortch:

On August 31, 2005, Harold Feld, Senior Vice President, Media Access Project, met with Jordan Goldstien of Commissioner Copps' Office and Rudy Brioché of Commissioner Adelstein's Office to discuss the above captioned matter.

The discussion centered on public interest obligations for digital radio broadcasters. Mr. Feld first noted that whatever statutory and existing Commission obligations apply to analog broadcasters should apply to digital broadcasters on their free digital stream, which would constitute "broadcasting" even under the Commission's *Subscription Video* decision.

With regard to possible subscription services, Mr. Feld noted that the *Subscription Video* decision permits the FCC to shield subscription services from statutory broadcast obligations. But Nothing *compels* the Commission to do so. As a matter of Commission discretion, if it finds that imposing obligations on subscription services serves the public interest, it has the authority to do so consistent with the *Subscription Video* service.

Differences in the legal and factual situation in digital radio compel a different approach from that used in digital television. In digital television, Congress explicitly directed the Commission to provide digital licenses to existing television broadcasters and to "allow the holders of such licenses to offer ancillary or supplementary services." Section 336(a)(1)-(2). Congress also mandated that digital television broadcasters continue to serve the public interest on all broadcasting channels – whether analog or digital. Section 336(d).

By contrast, the digital radio transition is entirely a matter of Commission discretion. Current analog licensees have no right or expectation to anything beyond their existing analog frequency, and the Commission can and should condition lucrative new spectrum rights on greater service to the public. *See, e.g.*, Section 309(j)(3)(C) (licensing rules must avoid unjust enrichment).

Absent any Congressional action, the Commission should not thwart the intent of Congress to require political access, prohibit indecent content, and prohibit payola by allowing terrestrial radio licensees to convert licenses given for free-over-the-air broadcasting to pay services. As a matter of law, therefore, the Commission can and should distinguish between the digital television conversion and the digital radio conversion and require that broadcasters meet the requirements of Sections 312, 315, 317, 326, 507 and Commission rules regarding public safety or other public interest obligations. In particular, recent tragic events involving Hurricane Katrina have emphasized the need to require all broadcast services, whether subscription services or free over the air services, to provide timely emergency information.

Furthermore, the Commission has recognized since the 2002 Biennial Review Order that the radio market has become highly concentrated, threatening diversity of voices and competition. The Commission has also received abundant evidence in its *Localism* NOI that concentration in the radio industry has facilitated the growth of payola and payola-like practices, and that licensees managed by distant corporations do not provide outlets for local programming or serve the needs of their local communities. The Commission therefore has good reason to distinguish between television and radio on factual grounds.

Finally, Mr. Feld raised the issue of low power FM. Because the radio digital transition is entirely at the Commission's discretion, the Commission should be clear that LPFM stations have the right to transition to digital if they desire. In addition, the Commission should consider a separate inquiry into how the digital transition can facilitate the LPFM service.

In accordance with Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206, this letter is being filed with your office. If you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

Harold Feld
Senior Vice President

cc:
Jordan Goldstien
Ruddy Brioche